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THE UNITED STATES NAVAL WAR CODE OF 1900.

EXPLANATION.

In the following pages the article or articles of the Naval War Code upon which questions are raised or upon which discussions are based will in each case precede the questions and discussions. The code as a whole will be found at the end of the discussions, on pages 101-114. On the pages following the code will be found the Instructions for the government of armies of the United States in the field, pages 115-139; Convention between the United States of America and certain powers with respect to the laws and customs of war on land (Hague Convention, proclaimed by the United States April 11, 1903), pages 141-158; Convention for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864 (proclaimed by the United States November 1, 1901), pages 159-167.

DISCUSSIONS.

SECTION I.—HOSTILITIES.

Article 1.

The general object of war is to procure the complete submission of the enemy at the earliest possible period, with the least expenditure of life and property.

The special objects of maritime war are: The capture or destruction of the military and naval forces of the enemy; of his fortifications, arsenals, dry docks, and dockyards; of his various military and naval establishments, and of his maritime commerce; to prevent his

procuring war material from neutral sources; to aid and assist military operations on land, and to protect and defend the national territory, property, and sea-borne commerce.

(a) Would it be advisable to insert in Article 1 after line 3 as the clause beginning line 4 the words, "The general object of maritime war is to deprive the enemy of the use of the sea?"

The question in regard to the insertion of the words "The general object of maritime war is to deprive the enemy of the use of the sea" is raised in consequence of the position taken by certain French writers. Logically, there might be a statement of (1) the general object of all war, (2) the general object of the phase of war of which the code treats, (3) the special object of maritime war. Granting this arrangement, would the clause cover the objects of maritime war at the present time? Would it cover those measures which might be taken to inflict injury upon land defenses, etc.; or the measures to cooperate with the army in various ways?

In the first half of the nineteenth century the object of maritime war was for the most part to deprive the enemy of the use of the sea, but with the increase in the use of steam, the lengthening range of guns, etc., there has come an enlargement of the field of maritime control and of the range of objects at which it aims.

The general object of maritime war is not different from the general object of war as a whole. The field of operations is somewhat restricted, however. "The capture or destruction of the military and naval forces of the enemy; of his fortifications, arsenals, dry docks, and dockyards; of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land, and to protect and defend the national territory, property, and sea-borne commerce," are stated as the objects of maritime war. Yet some of these acts are no more the objects of maritime war in themselves than the killing of individuals in uniform is the object of land warfare. These measures

are such as are allowed with view to attaining the submission of the enemy. The destruction of a fortification or of commerce is not in itself the object of war, but merely a means to attain the object, and by the first section of this article should be reduced to the minimum, i. e., there should be "the least expenditure of life and property."

It is important to distinguish the object from the justifiable means of attaining the object. There is a growing tendency to penalize the nation which mistakes the means for the end. Certain measures may be used as contributory to the general object of war. Of course, it will be difficult at times to determine what is contributory, but action that is distinctly not contributory even though enumerated among the special objects, may not be justifiable, and may be censured. Censure might arise in consequence of the destruction of such a structure as a privately owned shipyard, provided such destruction was not reasonably necessary to the ends of the military or naval undertaking, though it might, under conceivable circumstances, be of service to the enemy.

The first part of Article 1 might well read: "The general object of war is to procure the complete submission of the enemy at the earliest possible period with the least expenditure of life and property."

"In maritime operations the usual measures for attaining this object are: The capture or destruction of the military and naval forces of the enemy, etc."

(b) Would a dry dock within hostile territory, owned and managed by a private company and sufficiently large to receive a ship of war, be liable to the same treatment as would fortifications and arsenals?

The destruction of a dry dock owned and managed by a private company would, from the context, not be included in the same class as fortifications and arsenals, which are distinctly classed as belonging to the enemy, i. e., "of his fortifications, etc."

While a public dry dock would be liable to capture or destruction, a private dry dock does not fall into this

category until it becomes such as to afford aid to the enemy. It may be in itself a commercial undertaking of value in peace and not specially designed for war, as would be the case of an arsenal or fortification.

The capture of the privately owned dry dock would of course be entirely justifiable at any time as a measure of war. The destruction is not justifiable under the same provision as that in regard to arsenals and fortifications, which are public and by nature adapted for war; but being private, if destruction be permissible at all, it must be based on Article 3, which, following the majority of authorities, would allow such an act if justified by a reasonable military necessity. Article XXIII (*g*) of The Hague Convention, with respect to the laws and customs of war on land, prohibits the destruction or seizure of "enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war." Taylor, in his recent book, *International Public Law*, page 547, says: "Private property according to existing rules is treated even more favorably than that of the public. Except in extreme cases, to be mentioned hereafter, it is both respected and protected. At The Hague it was declared that family honor and rights, individual lives and private property, as well as religious liberty and worship, must be respected. Private property can not be confiscated." "All private property, even that of the individual sovereign, is now respected, at least in theory, and booty therein is not permitted. As Zachariä expresses it, private property of the enemy can be touched only so far as the necessities of war require, for it is part of the war power of its country only so far as that country could itself exercise dominion over it."

Of course a commanding officer must himself judge as to whether a military necessity exists. To destroy the privately owned dry dock, except from military necessity, would constitute "wanton devastation" forbidden by Article 3 of the Naval War Code.

(*c*) How would a pleasure yacht be treated under the provisions of Article 1?

This question is raised because Article 25 specifies "merchant vessels, yachts, or neutral vessels," seeming to create a distinct class. The interpretation that has been given to the word "commerce" under the Constitution would probably be sufficiently wide to include pleasure yachts, but not if they are placed in a class by themselves. Hence, under Article 1, as interpreted with view to Article 25 and some of the earlier articles in Section IV as, e. g., Article 14, a pleasure yacht would not be included.

It would therefore have to be captured if at all under Article 3, which would be very difficult of application, because the proof of military necessity in the capture of a pleasure yacht would not be easy and often would be impossible. Hence, some provision should be made elsewhere in the code for such capture which may be as desirable as the capture of a merchant vessel. This will be introduced later.

(d) One further measure for attaining the objects of war which is becoming of more and more importance is the cutting off of the means of communication between the enemy and the outside world. It is therefore decided that the words "and communications" be added after the words "maritime commerce." To avoid possible confusion, it would further be advisable to insert instead of the words "to aid and assist" the words "to cooperate with the Army in" so that the clause would read "to cooperate with the Army in military operations on land."

Article 1 as revised would therefore read:

The general object of war is to procure the complete submission of the enemy at the earliest possible period, with the least expenditure of life and property.

In maritime operations the usual measures for attaining this object are: To capture or destroy the military and naval forces of the enemy; his fortifications, arsenals, dry docks, and dockyards; his various military and naval establishments, and his maritime commerce and communications;—to prevent his procuring war material from neutral sources;—to cooperate with the Army in military operations on land, and to protect and defend the national territory, property, and sea-borne commerce.

The above form was agreed upon as covering essential amendments provided Article 1 be retained in the code. It was, however, the general opinion—

1. That the article served no essential purpose because the general object of war is well known and needs no definition and the measures of maritime warfare vary with circumstances.

2. That it might tend to restrict an officer in the exercise of his functions rather than make these more clear to him.

A majority of the officers in attendance upon the conference were of the opinion that Article 1 should be stricken out entirely.

Article 2.

The area of maritime warfare comprises the high seas or other waters that are under no jurisdiction, and the territorial waters of belligerents. Neither hostilities nor any belligerent right, such as that of visitation and search, shall be exercised in the territorial waters of neutral States.

The territorial waters of a State extend seaward to the distance of a marine league from the low-water mark of its coast line. They also include, to a reasonable extent, which is in many cases determined by usage, adjacent parts of the sea, such as bays, gulfs, and estuaries inclosed within headlands; and where the territory by which they are inclosed belongs to two or more States, the marine limits of such States are usually defined by conventional lines.

How should such a body of water as Long Island Sound be regarded under the provisions of Article 2?

This situation does not from the point of view of the United States admit of discussion. It is the established rule that such waters as Long Island Sound are territorial waters of the United States. The jurisdiction over gulfs and bays having a mouth considerably over 6 miles wide is still open to difference of opinion. Hall briefly summarizes the current opinion as follows:

In any case the custom of regarding a line three miles from land as defining the boundary of marginal territorial waters is so far fixed that a state must be supposed to accept it in the absence of express notice that a larger extent is claimed.

The question of the principle upon which the extent of marginal waters should be founded and of the breadth of water that should be included, has of late attracted a considerable amount of attention. It is felt, and growingly felt, not only that the width of three miles is insufficient for the safety of the territory, but that it is desirable for a state to have control over a larger space of water for the purpose of regulating and preserving the fishery in it, the productiveness of sea fisheries being seriously threatened by the destructive methods of fishing which are commonly employed, and in many places by the greatly increased number of fishing vessels frequenting the grounds.

After being carefully studied and reported upon by a Committee of the Institut de Droit International, the subject was exhaustively discussed by the Institut at its meeting in Paris, in 1894, the exceptionally large number of thirty-nine members being present. With regard to the necessity of ascribing a greater breadth than three miles of territorial water to the littoral state there was no difference of opinion. As to the extent to which the marginal belt should be enlarged, and the principle upon which enlargement should be based, the same unanimity was not manifested, but ultimately it was resolved by a large majority that a zone of six marine miles from low-water mark ought to be considered territorial for all purposes, and that in time of war a neutral state should have the right to extend this zone by declaration of neutrality or by notification, for all purposes of neutrality, to a distance from the shore corresponding to the extreme range of cannon. (International Law, 4th ed., p. 160 and note.)

Article 3.

Military necessity permits measures that are indispensable for securing the ends of the war and that are in accordance with modern laws and usages of war.

It does not permit wanton devastation, the use of poison, or the doing of any hostile act that would make the return of peace unnecessarily difficult.

Noncombatants are to be spared in person and property during hostilities, as much as the necessities of war and the conduct of such noncombatants will permit.

The launching of projectiles and explosives from balloons, or by other new methods of a similar nature, is prohibited for a term of five years by the Declaration of The Hague, to which the United States became a party. This rule does not apply when at war with a noncontracting Power.

(a) In Article 3, line 4, should the clause "the use of poison" be stricken out?

The first clause, "military necessity permits," etc., provides that only such measures shall be used as are in accord "with modern laws and usages of war."

If there is one measure that is fully understood to be forbidden by the modern laws and usages of war, it is "the use of poison." This is forbidden by all codes. (See Hague Convention with respect to the laws and customs of war on land, Art. 23.) There is no more reason for insertion of "the use of poison" than of many other clauses; indeed less, because the use of poison is more generally forbidden than almost any other act. The clause should therefore be stricken out unless other specifications are to be introduced.

(b) In the same place, should the following be inserted? "The destruction of great public works primarily and mainly intended to promote commerce."

There has been much discussion upon the advisability of forbidding the destruction of "great public works primarily and mainly intended to promote commerce."

The Suez Canal already has a quasi neutralization. By the Convention of 1888 it was agreed that a system should be established to "guarantee at all times, and for all the powers, the free use of the Suez maritime canal." The articles showing the nature of this agreement as touching Article 3 of the Naval War Code are as follows:

ARTICLE I.

The Suez maritime canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the high contracting parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace.

The canal shall never be subjected to the exercise of the right of blockade.

ARTICLE IV.

The maritime canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article 1 of the present treaty, the high contracting parties agree that no right of war shall be exercised, nor shall any act of hostility, or any act having for its object to obstruct the free navigation of the canal, be committed in the canal and its ports of access, nor within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent powers.

Vessels of war of belligerents shall not revictual or take in stores in the canal and its ports of access, except in so far as may be strictly

necessary. The transit of the aforesaid vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and without any other intermission than that resulting from the necessities of the service.

Their stay at Port Said and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile power.

ARTICLE V.

In time of war belligerent powers shall not disembark nor embark within the canal and its ports of access either troops, munitions, or materials of war. But in case of an accidental hindrance in the canal, men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material.

ARTICLE VI.

Prizes shall be subject, in all respects, to the same rules as the vessels of war of belligerents.

ARTICLE VII.

The powers shall not keep any vessel of war in the waters of the canal (including Lake Timsah and the Bitter Lakes).

Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of which shall not exceed two for each power.

This right shall not be exercised by belligerents. (Holland, *Studies in International Law*, p. 289.)

It is proposed to give to the Panama or any similar great commercial undertaking exemption because an easily inflicted injury might destroy the work of years without giving to the belligerent any corresponding military advantage, e. g., the breaking of a dam which might flood or destroy much of the work on the Panama Canal.

If the United States constructs the canal without any provision for neutralization other than that in the Hay-Pauncefote Treaty of 1901, which is binding on Great Britain and the United States, some provision in regard to great public works might be desirable, provided other nations agree to the same rule. The advisability of an international agreement in regard to such great public

works is admitted, but it would not be advisable for the United States to forbid its officers action which other states do not deny to their officers.

Therefore the provisions of this clause as it stands, omitting "the use of poison," because that is covered by general rules, should stand.

(c) Under the provisions of the clause beginning "Noncombatants are to be spared," etc., should an unarmed dispatch boat be treated in any respects differently from an armored enemy's vessel; if so, in what respect?

The vessel is liable to treatment as a vessel engaged in the service of the enemy. In respect to the vessel, this case falls under the first paragraph of Article 13, and in respect to the personnel, under Article 10 of the code, which are as follows:

ART. 13. All public vessels of the enemy are subject to capture, except those engaged in purely charitable or scientific pursuits, in voyages of discovery, or as hospital ships under the regulations hereinafter mentioned.

ART. 10. The personnel of all public unarmed vessels of the enemy, either owned or in his service as auxiliaries, are liable, upon capture, to detention as prisoners of war.

(d) In the application of The Hague rule in regard to the launching of projectiles and explosives, what would be the effect if an enemy contracting party should make an offensive and defensive alliance with a noncontracting party?

This rule would cease to be binding. This portion of the code should read:

By the Declaration of The Hague, signed July 29, 1899, to which the United States is a party, it is provided that:

The contracting powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of similar nature.

The present Declaration is only binding on the contracting powers in case of war between two or more of them.

It shall cease to be binding from the time when in a war between the contracting powers one of the belligerents is joined by a non-contracting power.

(e) Should this Hague rule be renewed at the expiration of the five-year period?

The reasons for the limitation of the period to five years are shown in the report of The Hague Conference, made by the late Mr. Holls:

On the subject of balloons, the subcommittee first voted a perpetual prohibition of their use, or that of similar new machines, for throwing projectiles or explosives. In the full committee, on motion of Captain Crozier, the prohibition was unanimously limited to cover a period of five years only. The action taken was for humanitarian reasons alone, and was founded upon the opinion that balloons, as they now exist, form so uncertain a means of injury that they can not be used with accuracy. The persons or objects injured by throwing explosives may be entirely disconnected from the conflict, and such that their injury or destruction would be of no practical advantage to the party making use of the machines. The limitation of the prohibition to five years' duration preserves liberty of action under such changed circumstances as may be produced by the progress of invention. (The Peace Conference at The Hague, p. 95.)

The reasons that applied at the time of the Peace Conference are equally valid at the present time; therefore the article, as cited under (*d*) above, from present indications, should be renewed.

Article 4.

The bombardment, by a naval force, of unfortified and undefended towns, villages, or buildings is forbidden, except when such bombardment is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, or unless reasonable requisitions for provisions and supplies essential, at the time, to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given.

The bombardment of unfortified and undefended towns and places for the nonpayment of ransom is forbidden.

(*a*) Would it not be more strictly correct and in accord with the best opinion so to amend Article 4 as to read:

The bombardment by a naval force of unfortified and undefended towns, villages, or buildings is forbidden, though such towns, villages, or buildings are liable to the damages incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, and such towns,

villages, or buildings are liable to direct bombardment when reasonable requisitions for provisions and supplies at the time essential to the naval force are withheld, in which case due notice of bombardment shall be given.

The rules adopted by the Institute of International Law at Venice, 1896, provide:

ART. 1. There is no difference between the rules of the law of war as to bombardment by military forces on land and that by naval forces.

The Hague Convention, with respect to the laws and customs of war on land, provides:

ART. XXV. The attack or bombardment of towns, villages, habitations, or buildings which are not defended is prohibited.

ART. XXVI. The commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.

ART. XXVII. In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

The situation is, however, somewhat different in bombardment by land forces. It is evident, however, that it was not the intent that these rules of The Hague Convention should apply to naval warfare, as the conclusions of The Hague Conference contain, in the seventh resolution, the following statement: "The Conference expresses the wish that the proposition of regulating the question of bombardment of ports, cities, or villages by a naval force should be referred for examination to another conference."

As Article 4 of the code now reads, it has been held that unfortified and undefended towns may be bombarded directly, when such direct bombardment is a part of a more general attempt at the destruction of military or naval establishments, public depots of munitions of war, etc. It has been held that such bombardment might be undertaken upon a given day with the expectation that at some future time the

“military or naval establishments,” etc., would be bombarded.

Such action would not be permissible, however, according to the best opinion of modern times. Bombardment can only be aimed at “military or naval establishments,” etc., as named in Article 4. The “unfortified and undefended towns, villages, or buildings” may without direct intention be injured in the fire incidental to such bombardment. Such injury can not be called bombardment of the “towns, villages, or buildings.”

It should be observed that a single act of forcible resistance to an order of a properly authorized military officer may constitute defense. A town, village, or dwelling may thus easily pass from an undefended to a defended condition.

The requisition for supplies must be reasonable and must be properly made. The characteristics of such action are indicated by the Hague Convention with respect to the laws and customs of war on land.

ART. LII. Neither requisition in kind nor services can be demanded from communes or inhabitants, except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

These requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.

To avoid possible misinterpretation, the clause should read: “The bombardment, by a naval force, of unfortified and undefended towns, villages, or buildings is forbidden, though such towns, villages, or buildings are liable to the damages incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, and such towns, villages, or buildings are liable to bombardment when reasonable requisitions for provisions and supplies at the time essential to the naval force are withheld, in which case due notice of bombardment shall be given.”

(b) Should the clause "The bombardment of unfortified and undefended towns and places for the nonpayment of ransom is forbidden," be stricken out?

The clause "The bombardment of unfortified and undefended towns and places for the nonpayment of ransom is forbidden" should be retained as a part of the code. The matter of such bombardment has been recently and quite fully discussed before this Naval War College by Prof. John Bassett Moore and will be found in the publications of the Naval War College, International Law Situations with Solutions and Notes, 1901, pages 5-37. Latest opinion and practice alike support the retention of this clause of Article 4.

(c) Should a clause to the effect that "An open town which is defended against the entrance of troops or disembarked marines may be bombarded in order to protect the landing of soldiers and marines if the open town attempts to prevent it, and as an auxiliary measure of war, in order to facilitate an assault made by the troops and the disembarked marines, if the town defends itself," be inserted?

The insertion of such a provision is unnecessary, as "an open town" which is in the position described is no longer "an open town" in the sense of an undefended town, which is the town exempt by Article 4; therefore the town, by defense against the entrance of troops or disembarked marines, becomes liable to the military operations which might include bombardment if circumstances made it necessary.

(d) Would bombardment of an open town be justifiable in case a division of the enemy's army occupies the town and refuses to surrender on demand of the United States naval force?

The Institute of International Law, in its session in September, 1896, adopted the following regulation:

An open town may not be exposed to bombardment by the sole fact:

1. That it is the capital of a state or the seat of government (but, naturally, these circumstances give it no guarantee against bombardment).

2. That it is actually occupied by troops, or that it is ordinarily garrisoned by troops of various arms, destined to rejoin the army in time of war.

This rule, if generally accepted, would not cover the case under consideration, however, for the occupancy by the enemy's troops is not the sole fact nor even the important fact in this case. The important fact is that an armed force refuses on demand to surrender, and the fact that it remains in "an open town" in name, can not exempt the town or force from the necessary military measures. The town, in fact, becomes defended under these circumstances and is liable to treatment as such a town.

(e) The harbor of an unfortified town is supposed to contain submarine mines making entry dangerous. The commanding officer of the United States naval forces requests assurances in regard to the condition of the harbor. This is refused. Is the officer justified in bombarding the town in order to obtain an answer or as a measure of war?

The refusal to give information or assurances to the commanding officer leaves him no alternative other than to assume that the town is defended against approach from the sea. Such being the case, he is justified in bombarding the town after due notice, either in order to obtain an answer to his reasonable request for information or as a measure of war.

Article 5.

The following rules are to be followed with regard to submarine telegraphic cables in time of war, irrespective of their ownership:

(a) Submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require.

(b) Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.

(c) Submarine telegraphic cables between two neutral territories shall be held inviolable and free from interruption.

(a) Should the clause, "or at any point outside of neutral jurisdiction, if the necessities of war require," be added to (b) under Article 5?

After consideration of recent practice and the discussions in regard to the treatment of submarine telegraphic cables, it would seem best to elaborate the first clause of Article 5. It was evidently not intended to require that the provisions of Article 5 should be followed invariably. Accordingly the first clause should read as follows: "Unless under satisfactory censorship or otherwise exempt, the following rules are established with regard to the treatment of submarine telegraphic cables in time of war, irrespective of their ownership."

Clauses (a) and (c) are generally accepted as correct statements of the rules to be followed in case of cables connecting belligerent points on the one hand and neutral points on the other.

The situation involved in clause (b), "Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy," in various forms has been much discussed. It has been claimed that a submarine telegraphic cable between the territory of an enemy and neutral territory (1) should not be interrupted under any conditions, (2) could be interrupted only within the three-mile limit, (3) could be interrupted only when the belligerent landing place was under effective blockade, and (4) could be interrupted at any point outside of neutral jurisdiction if military necessity required such interruption. Others would modify some of these provisions further according to ownership, location, etc.

The subject of the treatment of submarine telegraphic cables was quite fully considered in the report of the Interdepartmental Committee on Cable Communications, made to the English Parliament, March 26, 1902. The Institute of International Law also gave the subject much attention at its meeting in September, 1902. The English committee admits that arrangements should be made "on the supposition that a considerable propor-

tion of cables will be cut," and that "it will be the interest of the belligerents to interrupt or control, by censorship, the telegraphic communications of their adversaries, even to the degree of occasioning detriment to neutrals and of incurring liability to make compensation to them for arbitrary interference with their cables." (Certain phases of the subject of the treatment of submarine telegraphic cables in time of war were discussed in the *International Law Situations*, Naval War College, 1902, pp. 7-20.)

At the session of the Institute of International Law in 1902 the question of the treatment of submarine telegraphic cables in time of war received much attention. Bearing upon the case of cables connecting neutral and belligerent territory, Von Bar, one of the German representatives, advanced the following proposition:

Comme les pays neutres ont le droit de communiquer librement avec les belligérants, les seuls titres admissibles pour entraver ou couper cette communication libre étant le blocus effectif et l'occupation militaire, il y a lieu de tirer les conclusions suivantes:

(a) Le câble sous-marin reliant un territoire neutre à un territoire appartenant à une des parties en guerre ne peut être coupé par un des belligérants que dans les cas suivants:

En pleine mer ou dans la mer territoriale de l'État ennemi, s'il y a blocus effectif et que ce blocus embrasse le rayon où se trouve le câble;

Dans le territoire ennemi même, si l'endroit de la côte où aboutit ou l'île où passe le câble est occupé, soit pour un temps prolongé, soit momentanément, par la partie belligérante.

En dehors de ces cas, le câble en question est inviolable en pleine mer comme dans la mer territoriale de la partie ennemie.

(b) Le droit de s'emparer et de profiter du câble en question n'existe que dans les cas où il y a droit de le couper.

(c) Il n'y a pas de différence à établir, quant au droit d'un État belligérant de couper un câble sous-marin ou de l'exploiter, entre les câbles exploités par un gouvernement neutre et les câbles exploités par des compagnies privées concessionnaires.

(d) Dans les cas précités où existe le droit de l'État belligérant de couper un câble sous-marin ou de s'en emparer autrement, aucun dédommagement du chef de l'exercice de ce droit n'est dû à la compagnie ni à l'État à qui appartient le câble, ni aux personnes qui auraient fait câbler des dépêches. (*Annuaire de L'Institut de Droit International*, 19, 1902, p. 12.)

Von Bar further says (p. 16):

Il me semble pourtant, sans qu'il soit nécessaire de faire usage de la théorie du droit d'angarie, droit douteux et souvent contesté, que l'on peut poser simplement comme règle générale que les États neutres, et de même leurs sujets, ont le *droit de communiquer librement* avec l'une et l'autre des parties belligérantes et leurs territoires, et qu'on ne doit reconnaître à cette règle que deux exceptions, dont l'une se fonde sur *l'occupation militaire* et l'autre sur le droit de *blocus*.

Comme la pleine mer ne peut être occupée, il ne peut être permis de couper un câble servant de communication entre un pays neutre et un territoire ennemi, et comme le blocus, pour donner le droit d'interrompre les communications des neutres avec l'ennemi, doit être *effectif*, il n'y a pas lieu d'étendre l'exception de manière à permettre la destruction d'un câble en pleine mer à la seule condition que cela se fasse à une distance du territoire ennemi où un blocus *peut* être exercé, mais n'est pas pratiqué réellement.

La question spéciale la plus délicate est peut-être celle de savoir si l'État belligérant a le droit de couper des câbles reliant un territoire neutre à un territoire ennemi dans les *eaux territoriales* de l'ennemi. Il semble juste de faire dépendre la solution de la possibilité d'une occupation réelle. Dans les eaux territoriales, soumises complètement à la souveraineté de l'État et, de ce chef, pouvant être occupées réellement, ce droit existe. Mais il n'existe pas quant à la mer territoriale dans le sens des résolutions de l'Institut de 1894 (*Annuaire*, 13, p. 329) ("Küstenmeer"), cette partie de la mer n'étant pas complètement soumise à la souveraineté exclusive de l'État riverain, et servant, au contraire, au commerce général et libre du monde entier.

Renault, one of the French members, disagreed with Von Bar, saying, that while agreeing with (b), (c), (d), above, he did not agree with (a).

Dans le cas d'un câble sous-marin reliant un territoire neutre au territoire de l'un des belligérants, j'admets pour l'autre belligérant le droit de couper le câble, soit sur le territoire ou dans les eaux territoriales de son adversaire, soit même en pleine mer.

Je ne distingue pas suivant qu'il y a ou non blocus. (*Annuaire* 1902, p. 18.)

Other propositions were advanced. Professor Holland, of Oxford, offered the following (p. 301):

1. Le câble télégraphique sous-marin, unissant deux territoires neutres, est inviolable. (*Institut de Droit international*, 1879.)

2. Le câble reliant les territoires de deux belligérants ou deux parties du territoire d'un des belligérants peut être coupé partout, excepté dans les eaux territoriales neutres.

3. Le câble reliant un territoire neutre à un territoire appartenant à un des belligérants ne peut être coupé que dans les eaux territoriales de ce belligérant.

4. En ce qui concerne l'application des règles précédentes, il n'y a de différence à établir, ni entre les câbles d'État et les câbles appartenant à des individus, ni entre les câbles de propriété ennemie et ceux qui sont de propriété neutre.

5. Quand la coupure d'un câble est permise selon les règles précédentes, aucune indemnité n'est due aux propriétaires ennemis du câble pour cet acte, accompli comme opération de guerre. (Les prescriptions de l'article 53 de la Convention de La Haye ne sont pas applicables à ce cas.)

6. Au contraire, le belligérant qui a coupé un câble de propriété neutre (soit d'État, soit d'individus), dans l'exercice d'un droit analogue au *jus angariae* [ou de visite en haute mer (1)], est tenu des frais de réparation. Il n'est pas tenu d'indemniser les propriétaires pour la perte de leurs bénéfices. (Annuaire 1902, p. 301.)

Professor Perels, of Berlin, offered the following (p. 302):

1. Le câble télégraphique sous-marin reliant des territoires neutres est inviolable.

2. La liberté d'action des belligérants n'est pas restreinte, si le câble relie leurs territoires respectifs ou deux points du territoire d'un seul des belligérants.

3. Pour le cas où le câble relierait le territoire d'un belligérant et le territoire d'un neutre, une réglementation générale n'est pas possible actuellement. Les mesures à prendre dépendront, selon les circonstances, des opérations militaires; elles ne dépendent nullement du droit de propriété des câbles.

Dans l'intérêt du commerce international, il est cependant désirable de ne détruire ou interrompre la communication télégraphique que si la nécessité militaire l'exige.

Rolin, editor of the *Revue de droit international et de législation comparée* made the following proposition (p. 317):

Le câble sous-marin reliant un territoire neutre à un territoire appartenant à une des parties en guerre ne pourra en aucun cas être coupé par un des belligérants dans les eaux territoriales ou neutralisées dépendant d'un territoire neutre.

Il pourra être coupé, selon les nécessités des opérations militaires, sur le territoire et dans les eaux territoriales de l'ennemi.

Il pourra également être coupé en pleine mer, si après avoir notifié à l'État neutre l'interdiction de transmettre des dépêches, etc. * * *

Upon a vote of the Institute of International Law in 1902, as to whether it should be absolutely forbidden to

interrupt in the high sea a cable uniting a belligerent and a neutral, 14 favored absolute prohibition of interruption of such cable in the high sea, 17 opposed such prohibition, and 1 did not vote. A subsequent vote showed that although the institute was not in favor of absolute prohibition of interruption of cables in the high sea, it was not, therefore, of the opinion that the right to interrupt was unlimited.

Finally the institute, 19 voting in the affirmative, 6 in the negative, and 4 not voting, adopted the following (p. 331):

RÈGLES CONCERNANT LES CÂBLES SOUS-MARINS EN TEMPS DE GUERRE.

I. Le câble sous-marin reliant deux territoires neutres est inviolable.

II. Le câble reliant les territoires de deux belligérants ou deux parties du territoire d'un des belligérants peut être coupé partout, excepté dans la mer territoriale et dans les eaux neutralisées dépendant d'un territoire neutre ("neutralisées" par traité ou par déclaration conformément à l'article 4 des résolutions de Paris de 1894).

III. Le câble reliant un territoire neutre au territoire d'un des belligérants ne peut en aucun cas être coupé dans la mer territoriale ou dans les eaux neutralisées dépendant d'un territoire neutre.

En haute mer, ce câble ne peut être coupé que s'il y a blocus effectif et dans les limites de la ligne du blocus, sauf rétablissement du câble dans le plus bref délai possible. Ce câble peut toujours être coupé sur le territoire et dans la mer territoriale dépendant d'un territoire ennemi jusqu'à une distance de trois milles marins de la laisse de basse-marée.

IV. Il est entendu que la liberté de l'État neutre de transmettre des dépêches n'implique pas la faculté d'en user ou d'en permettre l'usage manifestement pour prêter assistance à l'un des belligérants.

V. En ce qui concerne l'application des règles précédentes, il n'y a de différence à établir ni entre les câbles d'État et les câbles appartenant à des particuliers, ni entre les câbles de propriété ennemie et ceux qui sont de propriété neutre.

The above rules are in some respects more exact than those of the Naval War Code, though, as the discussions show, not wholly satisfactory to members of the Institute.

The first rule is essentially the same as that of the Naval War Code.

The second rule contains a provision protecting a cable which connects belligerent in so far as it is

actually within neutral jurisdiction. This is covered by Article 2 of the Naval War Code, however.

The third rule is more detailed and specific than the provisions of the Naval War Code, which is that "Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy." The rules of the institute cover this point in the last clause of this third rule. In regard to this provision of the Naval War Code, the statement is that such cables may be cut within enemy jurisdiction, and not that they are not to be cut elsewhere. It is certain that such a cable should not be interrupted by any act which itself shall take place within neutral jurisdiction. It would not, of course, be allowable for any belligerent to cut any cable within the three-mile limit of a neutral state. There is then left entirely undetermined the status of cables between an enemy and a neutral so far as they lie in the high seas.

If cables between neutrals and belligerents can be cut only within the jurisdiction of the belligerent, it would be good policy for a belligerent to see that, so far as possible, immediately on the outbreak of hostilities a neutral landing place be interposed between the termini of all his cables or to make provision for neutral landing places in their original construction, thus leaving only the guardianship of the cable line within the three-mile limit for the belligerent's cruisers. This would probably not be maintained seriously in a case necessitating the cutting of a cable, even beyond the three-mile limit, or, as was maintained in the Spanish-American war, "the limit of the range of the enemy's gun." (Wilson, *Submarine Telegraphic Cables in their International Relations*. Lectures, Naval War College, Newport, 1901, p. 32.)

Further, it may be said: "This code does not, however, cover the debatable points in regard to cables which are beyond the three-mile limit or other limits of jurisdiction of a belligerent and the same limits of a neutral state. The status of such cables must be determined, for the

present, by reference to general principles and the tendency is to so determine their status. This is necessary because great injury might be done to one or both of the belligerents if the laws of different states might say what was proper service in the time of war, as was formerly thought to be possible unless a convention was adopted among the leading states. If the material of which the cable is to be made is liable to seizure and confiscation on the high sea in the time of war, then it is not too much to claim that the cable itself, when in full operation, is liable to the consequences of war under like circumstances." (Ibid, p. 37.)

The rule of the Institute tries to cover the treatment of cables beyond the territorial jurisdiction of the belligerent by specifying that only within the limits of effective blockade is cutting allowable. The fourth rule introduces an idea, which, if carried out, would make all cutting unnecessary, for it is only to prevent the transmission of hostile messages that cutting is necessary within the territorial jurisdiction of the enemy, within blockade lines; or at any other point. The destruction of a harmless cable would be prohibited as wanton devastation. It will be evident that if the fourth rule can be enforced the third will be unnecessary, because a cable of this class would not be used for hostile purposes. If the fourth rule is not enforced, the limitation of cutting to the places specified in the third rule becomes arbitrary.

The fourth of these rules in regard to cables adopted by the Institute states that "It is intended that the liberty of the neutral state to transmit dispatches shall not involve the right to use or to permit their use, manifestly for lending aid to one of the belligerents." This rule does not, however, provide any means for the prevention of the use which is forbidden.

If a submarine cable connecting one belligerent and a neutral state is used to aid that belligerent, the other belligerent doubtless has a right to prevent such use in any reasonable manner provided he does not thereby violate neutral territory or neutral rights. This fourth

rule provides that the neutral has no right to permit the cable to be used manifestly to aid one of the belligerents. If the neutral does not prevent such use, then the other belligerent impliedly must take action. The action most feasible and certain is often the cutting of the cable outside of neutral jurisdiction. Therefore, if military necessity justifies such action, it may be taken. The officer responsible for the interruption must realize that he assumes the responsibility and that this responsibility should be assumed only when based on military necessity. As M. Renault well said in the discussion, "Il faut qu'a des moyens d'attaque nouveaux correspondent des moyens de défense nouveaux: le moyen d'attaque étant devenu plus rapide et plus dangereux, le moyen de défense peut devenir plus dur, puisque autrement il n'y aurait plus aucun moyen de défense du tout." (Annuaire, 1902, p. 314.)

Pending an international agreement, the following wording would meet the requirements of the United States Navy, while giving reasonable guarantee as to the observance of neutral rights:

ART. 5. Unless under satisfactory censorship or otherwise exempt, the following rules are established with regard to the treatment of submarine telegraphic cables in time of war, irrespective of their ownership:

(a) Submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require.

(b) Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy or at any point outside of neutral jurisdiction, if the necessities of war require.

(c) Submarine telegraphic cables between two neutral territories shall be held inviolable and free from interruption.

There is no doubt, however, that this whole matter of the treatment of submarine telegraphic cables in time of war should be referred to an international convention for adjustment. So far as the present conditions are concerned the rules as above stated accord with practice, and while opinion is divided, some of the best authorities agree with the above rules and particularly with the

provision that military necessity may compel interruption outside of neutral jurisdiction. [Perels, *Das internationale öffentliche Seerecht der Gegenwart*, Berlin, 1903; p. 186.] The rules should, from the above and from other reasons, read as stated until some international agreement is devised.

(b) Should a provision in regard to wireless telegraphy be inserted in the code?

At the present time, the future of wireless telegraphy is uncertain and the possibility of interruption not fully determined. There is no reason for binding the officers by any regulations in advance of more accurate knowledge of the subject itself and of its possibilities. Therefore the proposition to insert a provision in regard to wireless telegraphy should not be entertained unless by international agreement.

Article 6.

If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed on in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon these matters.

Could a fast pleasure yacht be seized and used for a dispatch boat under the provisions of Article 6?

“Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war and which are lawful according to the modern law and usages of war.” (Instructions for the Government of Armies of the United States, Article 14; Naval War Code, Article 3.)

If military necessity exists, the fast pleasure yacht could be seized and used for a dispatch boat without question. A fast pleasure yacht is properly included under the clause “neutral vessels.”

Article 7.

The use of false colors in war is forbidden, and when summoning a vessel to lie to, or before firing a gun in action, the national colors should be displayed by vessels of the United States.

(a) Does "war," as used in Article 7, mean the period of actual engagement in hostile action or the period from the declaration to the termination of the war in the general sense?

As war throughout the code is used to indicate the period during which the peaceful relations between states are severed, there is no reason for giving to the word a different interpretation at this point. Therefore, the word does not refer to the engagement, but to the period of hostile relationship between the states, regardless of the issue or failure to issue a declaration.

"No one can claim, as a right, that a public declaration of war shall be promulgated, unless it be the nation by whose government it is made, and then it serves only as a notice to their own citizens and subjects." (Blatchford, Prize Cases; Betts, J., in "Hiawatha," 1.)

"The question of the point of time at which a state of peace gives way to a condition of war is a question of fact. War begins with the first act of open hostility." (Walker, "Science of International Law," p. 243.) Risley, in "The Law of War," page 82, summarizes the present position:

The following conclusions seem to be warranted:

1. War, as affecting belligerents *inter se*, commences from the date of an absolute declaration if its issue precede any act of hostility. In all other cases the war dates from the commencement of hostilities. Thus if a conditional declaration, such as an ultimatum addressed to an offending state, is followed by war, the war will date from the commencement of hostilities and not from the conditional declaration.

2. War, as affecting any neutral power, commences from the date at which the neutral power has, or may reasonably be supposed to have, knowledge of its existence. If a declaration or manifesto is issued, the neutral's knowledge of course dates from the official announcement; in all other cases the conduct of neutrals is entitled to the most favorable construction, and hostilities must have become so open and notorious that ignorance of them on the part of the

neutral is impossible before the liabilities attaching to their neutral character will be enforced by the belligerents.

In modern times, however, questions as to the commencement of war are not likely to arise, because the rapidity of communication, the activity of the press, and the publicity accorded to all matters of domestic and international policy combine to make the outbreak of a war immediately known all over the world. Every state is in fact cognizant of the precise date of its commencement, whether it be the date of an official notification or the date of the commencement of actual hostilities.

(b) Should the entire article be stricken out?

Admitting that "war" applies to the entire period of hostile relationships, and no other interpretation can be given, what does the Article 7 mean?

1. The use of a false flag is forbidden during the period of war.

2. Before or when firing a gun or engaging in action, the flag of the United States should be displayed.

3. There is no obligation to display the flag of the United States till the time of summoning a vessel to lie to or till the time of action. The absence of any flag, or the presence of a flag which is not false, is not mentioned.

Upon 2 and 3 all authorities who refer to the subject are agreed, i. e., that before firing a gun the true flag must be displayed and that till such time no flag need be raised.

There remains the question whether what many regard as a form of perfidy is allowable up to the time of firing a gun and is not allowable at the actual discharge of the gun, when it would be of little or no service other than to establish to a certainty the probable enemy character of the vessel firing the gun. It would not be presumed that a neutral would fire upon a belligerent or one vessel of a belligerent upon another vessel of the same belligerent, consequently it is held that the false flag would be pulled down and the true flag would be displayed at the time when the false flag would be of no further use.

In summoning a neutral vessel to lie to the use of true colors is necessary, however, as it establishes the

identity of the vessel and gives evidence of its right in time of war to interfere with neutral commerce.

The use of false colors in land warfare has been absolutely prohibited, as shown in the following.

Instructions United States Army, 1863, Article 65:

The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

Brussels Rules, 1874, Articles 12, 13:

ART. 12. The laws of war do not allow to belligerents an unlimited power as to the choice of means of injuring the enemy.

ART. 13. According to this principle are strictly forbidden:

(*f*) Abuse of the flag of truce, the national flag, or the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention.

Oxford Manual, 1880, section 8:

It is forbidden:

(*d*) To make improper use of the national flag, of signs of military ranks, or of the uniform of the enemy, of a flag of truce, or of the protective marks prescribed by the Convention of Geneva.

Hague Convention, Laws and Customs of War on Land, Article XXIII:

Besides the prohibitions provided by special conventions, it is especially prohibited:

(*f*) To make improper use of a flag of truce, the national flag, or military ensigns and the enemy's uniform, as well as the distinctive badges of the Geneva Convention.

It has come to be the generally accepted opinion that "deceit involving perfidy should be forbidden."

The flag is the emblem held most esteemed and sacred among states. It is the usual method of showing allegiance and is to be raised only on sufficient authority.

The use of false colors on land or similar perfidy deprives the users of the "claim to protection of the laws of war."

It is evident that the use of false colors in warfare on the sea may bring about results very different from those which would follow warfare in which false colors were prohibited. Pillet has proposed the establishment of a

zone into which no vessel may come without establishing its identity. He says:

Les transformations de l'armement maritime ont rendu cette règle traditionnelle tout à fait insuffisante au point de vue de la sécurité des belligérants. Il est possible, en effet, qu'un navire de guerre ennemi ne hisse son véritable pavillon qu'au moment précis où il lâche la bordée qui mettra son adversaire hors de combat; il est possible surtout, qu'un torpilleur s'approche à bonne portée, puis arbore ses couleurs et immédiatement lance une torpille contre laquelle le navire visé ne pourra pas toujours se protéger. La tolérance admise quant au pavillon peut ainsi avoir pour conséquence des surprises fatales, surprises que cette seule tolérance permet de pratiquer. Ce n'est évidemment pas pour obtenir de tels résultats que la liberté ancienne a été admise, et on ne prévoyait pas, au moment où cette coutume s'est formée, que la rapidité de certains navires et la puissance de leurs engins de destruction permettraient ainsi de ruiner un vaisseau de guerre avant même qu'il pût savoir qu'il était en présence d'un ennemi. Pour remédier à cet inconvénient qui est grave il conviendrait de s'attacher à une idée émise autrefois par quelques auteurs (De Cussy, Causes célèbres du droit des gens, 1 liv., III, sec. 60; Hautefeuille, Histoire des origines, p. 23; Bluntschli, Völkerrecht, sec. 318; Phillimore, Commentaries upon international law, t. 1, sec. 203) et de conférer aux navires de guerre des belligérants le droit de juridiction sur une certaine zone (de trois milles de rayon par exemple) dont chaque navire serait le centre, et dans laquelle aucun vaisseau de guerre ne pourrait entrer sans se faire reconnaître, à peine d'être traité comme ennemi. Il est à souhaiter que les Puissances maritimes s'occupent de cette difficulté, et qu'une convention internationale soit signée qui consacre la solution que nous proposons. (Les Lois Actuelles de la Guerre, 2d ed., p. 144.)

Hall makes the following statement of such rules as allow false colors:

A curious arbitrary rule affects one class of stratagems by forbidding certain permitted means of deception from the moment at which they cease to deceive. It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action: but it is held that soldiers clothed in the uniforms of their enemy must put on a conspicuous mark by which they can be recognized before attacking, and that a vessel using the enemy's flag must hoist its own flag before firing with shot or shell. The rule, disobedience to which is considered to entail grave dishonor, has been based on the statement that "in actual battle, enemies are bound to combat loyally and are not free to insure victory by putting on a mask of friendship." In war upon land victory might be so insured, and the rule is consequently sensible; but at sea, and the prohibition is spoken of generally with reference to maritime war, the mask of friendship no longer misleads when

once fighting begins, and it is not easy to see why it is more disloyal to wear a disguise when it is obviously useless, than when it serves its purpose. (Hall, International Law, 4th ed., p. 558.)

The use of "false colors" is evidently subject to much difference of opinion. (See Perels, *Seerecht ger Gegenwart*, p. 182.) No scheme of such use has been proposed which seems satisfactory, and it is difficult to see how honorable warfare can be conducted upon such a basis as is implied in the use of false colors. Undoubtedly, the rule prohibiting the use of false colors in war should be made with definite provisions in regard to legitimate ruses in maritime warfare.

It is, however, the opinion of the officers in conference upon this subject that the United States, without a similar provision against the use of false colors by other States, would be put at great disadvantage in time of war through the existence of this prohibition in the United States Naval War Code. The officers were therefore almost unanimously (one dissenting) of the opinion that this rule should be stricken from the code pending some international agreement upon the use of "false colors."

(c) Should all of the article following the word "forbidden" be stricken out?

If the article is retained, the words following "forbidden" in Article 7 are necessary as specifying at what time the national colors should be displayed, while during the period preceding there is no prohibition of the use of emblems that are not in the category of false colors, nor objection to sailing without a flag.

(d) Could a torpedo boat approach near an enemy ship under false colors and then raising true colors launch a torpedo against its opponent?

Under the present rules there would be no difference in the application of the rule to a torpedo or other vessel.

(e) One author says, "A ship may by employing false colors attempt to escape pursuit on the part of the enemy or perhaps even force a blockade; but it is absolutely forbidden by the regulations as well as by the usages of war to engage in hostilities under a false flag;

violation of this rule would be inexcusable even in the case of the most pressing necessity." How far is this position correct and in what respects is it incorrect?

This situation falls into three divisions, (1) the use of false colors to escape pursuit, (2) to force a blockade, and (3) to engage in hostilities.

(1) The use of false colors to evade pursuit has generally been held as allowable. It must be remembered, however, that this escape of an enemy vessel under false colors may add just so much to the fighting force of the enemy by so much delaying the realization of the end of war, viz, "the complete submission of the enemy at the earliest possible moment."

(2) The forcing of a blockade under false colors is generally regarded as an act of war and therefore forbidden. This seems to be the more reasonable opinion and the opinion which the fact sustains. The passing of a blockade by a public ship of a neutral is a courtesy allowed on the part of the blockading fleet. A neutral should not be put under suspicion because it is allowable for an enemy to use his flag. The consequences of this form of deceit so directly affect the neutral that such use of the flag should be forbidden.

(3) The remaining portion of the quotation is in accord with the best opinion and would be universally upheld.

It is the final opinion that Article 7 should be made the subject of international agreement or else should be repealed.

Article 8.

In the event of an enemy failing to observe the laws and usages of war, if the offender is beyond reach, resort may be had to reprisals, if such action should be considered a necessity; but due regard must always be had to the duties of humanity. Reprisals should not exceed in severity the offense committed, and must not be resorted to when the injury complained of has been repaired.

If the offender is within the power of the United States he can be punished, after due trial, by a properly constituted military or naval tribunal. Such offenders are liable to the punishments specified by the criminal law.

(a) In fourth line of Article 8, should the word "military" be inserted before the word "necessity?"

No, because in general cases where reprisals would be resorted to, such actions would not be because of military necessity, but rather for disciplinary purposes in order that the laws and usages of war might subsequently be observed, e. g., when uncivilized peoples do not observe these rules.

Action in the nature of reprisal against civilized enemies should be sanctioned by the general government and not undertaken by a subordinate officer unless a military necessity requires, as there are other means for the treatment of civilized enemies.

(b) A prominent authority says, "Reprisal is an act of vengeance pure and simple and should be wholly proscribed or at least reserved for wars undertaken against the uncivilized who have no notion of the law of nations and are accessible only to the feeling of fear." Is this a proper statement of the fact and should the whole of Article 8 be stricken out?

This is not a correct statement of fact as reprisals are now viewed, though reprisals may sometimes be acts of vengeance. This is the general continental point of view, however. The English and American point of view is that reprisals are undertaken to secure redress for injuries and usually are aimed against property or intercourse, rarely against persons.

Article 8 is however greatly restricted as seen in its provisions for reprisals:

1. For violation of "laws and usages of war," one specific cause.
2. By an "offender beyond reach."
3. In case of "necessity" only.
4. Within duties of "humanity."
5. Proportioned to offense.
6. Only in case of "injury not repaired."
7. Outside power of the United States.

Upon this debatable question of reprisals, an almost wholly obsolete form of action, probably it would have been better to refrain from utterance, but in view of the fact that the article has been issued, it may be well to leave it unchanged.